No. 924

In the Supreme Court of the United States

OCTOBER TERM, 1941

ARSENAL BUILDING CORPORATION AND SPEAR & CO., INC., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court (R. 330–338) is reported in 38 F. Supp. 207. The opinion of the Circuit Court of Appeals (R. 343–349) is reported in 125 F. (2d) 278.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 15, 1942 (R. 349). The petition for a writ of certiorari was filed Febru-

ary 5, 1942, and granted March 2, 1942 (R. 350). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Petitioners' employees covered by the injunction below are engaged in activities necessary to the operation and maintenance of a loft building in which large quantities of goods are produced for interstate commerce. The primary question presented is whether the employees are "engaged in * * * the production of goods for commerce" within the meaning of Section 7 of the Fair Labor Standards Act because they are engaged in a "process or occupation necessary to the production" within the meaning of Section 3 (j) of the Act.

2. Six of the employees are the starter and operators of freight elevators who transport goods arriving from other states or consigned to destinations in other states to and from the various lofts in the building. Are such employees also "engaged in commerce" within the meaning of Section 7 of the Act?

3. Are the employees here involved "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce" within the meaning of Section 13 (a) (2), which exempts such employees from Section 7?

4. Does the Fair Labor Standards Act, as applied to the employees here involved, constitute a valid exercise of the commerce power?

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* Copies of the Act will be furnished to the Court upon the oral argument.

STATEMENT

On March 31, 1941 (R. 1), the Administrator filed in the district court an amended complaint against petitioners alleging that they owned and operated a loft building devoted to the manufacture of goods for interstate commerce and that certain of petitioners' employees, by reason of the relationship of their work to the manufacturing activities conducted in the building, were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act.[1] Charging that such employees had not been paid the overtime compensation required by Section 7, the amended complaint sought an injunction to restrain further violations of the Act (R. 2–5). In their answer, petitioners admitted that they had not complied with Section 7 but denied that any of their employ-

[1] The complaint did not allege violations with respect to petitioners' rental agents, rent collectors, bookkeepers, and similar employees engaged in carrying on the fiscal aspects of petitioners' business.

ees were subject to the Act (R. 6–9).[2] At the suggestion of the District Court following the trial, petitioners amended their answer to allege as an affirmative defense that Section 7 did not apply to their employees by reason of the "service establishment" exemption in Section 13 (a) (2) (R. 253–254, 331–332).

Petitioners own and operate[3] a twenty-two story manufacturing building in the heart of the New York City garment manufacturing district (R. 21, 30). Except for a few stores at the street level, the building is occupied by approximately 45 firms, more than 40 of which manufacture women's clothing for interstate commerce (R. 3, 9, 24, 316–318).[4] The value of the goods manufactured in the building amounts to more than $29,000,000 annually and of these goods more than 80 percent in value is shipped out of the state (R. 316–318).[5] The an-

[2] The answer alleged several other defenses, some of which were withdrawn or overruled at a pre-trial conference (R. 16, 17, 331) and others of which were dismissed or abandoned at the trial (R. 331). None of these defenses is relevant here.

[3] Arsenal Building Corporation owns the building; Spear & Co., Inc., is Arsenal's managing agent (R. 21, 183). Petitioners agreed at the trial that if the employees were covered by the Act, the injunction should run against both petitioners (R. 16).

[4] The few remaining concerns are engaged in the sale and shipment, in wholesale lots, of silks, rayons, and other materials to manufacturers, wholesalers, and contractors in other states (R. 3, 24).

[5] These figures reflect only the finished products moving out of the building and do not include the further shipment

nual pay roll of the some 2,000 workers employed by the manufacturers in the building totals over $3,250,000 (R. 316–318).

The employees of petitioners covered by the injunction below are two firemen, an electrician or mechanic, a starter and five operators of the freight elevators, a starter, assistant starter and six operators of the passenger elevators, two watchmen, five day porters and a night porter (R. 90–91). The firemen operate and care for the heating plant and boilers furnishing heat and hot water necessary to the manufacturing operations (R. 36, 127–129, 151, 164).[8] The mechanic or electrician wires the manufacturers' premises to accommodate machinery, makes electrical repairs, fixes leaks in the water system, maintains the elevator motors, equipment and signal system, maintains and repairs the switchboard controlling the electrical supply, repairs short circuits in the wiring system, replaces fuses and motor armatures, renews worn faucets, repairs broken pipes, and keeps all radiators in the building in working order (R. 30–37,

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of semifinished goods from the building to intermediate processors in other states or back to the manufacturers from the processors; frequently such processing requires several separate interstate shipments from and to the building before the product is finished (R. 158, 160–161, 316–318).

[8] Petitioners submeter electricity for light and power to the manufacturers (R. 164, 293, 300). The water needed in the manufacturing processes, for operation of the automatic fire sprinkler system, and for the sanitary facilities, is pumped to tanks on the roof and from there circulated throughout the building by a gravity and pressure system (R. 33–34).

46). While major repairs on the fire sprinkler system are performed by an outside contractor, the mechanic checks the tanks daily to see that they are kept at the appropriate pressure and have an adequate amount of water (R. 49). He also packs the valves to prevent or stop leaks which might otherwise damage the manufacturing premises or goods in them (R. 34–35, 50). In cold weather he takes measures against freezing of the sprinkler system (R. 49).

The building's four freight elevators carry to and from the manufacturing lofts the heavy volume of goods described above (R. 27, 48, 55, 62–63, 148, 158). The carriers to which the goods are entrusted for interstate transportation pick up and deliver the goods at the manufacturers' premises (R. 158, 161–162). The bulk and weight of the goods preclude their movement to and from their point of destination or departure except by elevator (R. 158, 159, 176). The traffic in merchandise in and out of the manufacturing plants in the building is constant and heavy (R. 118). Deliveries to and pick-ups from the various manufacturers in the building are made daily, and the freight elevators are in practically uninterrupted use during the business day (R. 161–162).

The five passenger elevators are indispensable to the transportation of the 2,000 manufacturing employees in the building to and from their places of

work. They are also essential to enable the employers and the constant flow of customers, buyers, truckmen and salesmen to reach the lofts on the upper floors (R. 63, 64, 68, 75, 150). These elevators likewise carry delivery men with parcel post and light packages to and from the manufacturers' premises (R. 131–132).

The building's night watchmen make regular rounds of the building to guard against fire and theft; during the summer, they also supervise the boilers during the firemen's off hours so as to assure an adequate supply of hot water for the manufacturers (R. 125–126). The building is kept clean and fit for occupancy by the porters; they sweep and wash the floors and stairs in the public portions of the building, keep the common toilets clean, and keep the halls clear of rubbish and trash. They also knock down walls and erect partitions in the manufacturers' plants, paint their floors and do numerous other jobs (R. 76–78, 95–96). They relieve the freight elevator operators daily (R. 77, 80).

The dependence of the manufacturing operations carried on in the building upon the work of these employees is graphically illustrated by proof in the record concerning a strike of maintenance employees in the New York City garment manufacturing area during February 1939. During the three days the strike lasted (R. 108) the flow of

goods into and out of the building here involved was drastically reduced and production virtually came to a halt. The stoppage of heat during cold weather made the building unfit for occupancy (R. 41, 108). Without elevator service the manufacturing employees could not reach their benches; those who braved long flights of stairs found a shortage of materials since incoming goods could not be delivered (R. 41, 108, 177). Shipments from the building into the channels of interstate commerce suffered an immediate and sharp decline (R. 166). On the day before the strike the Railway Express Agency took 1,260 shipments from the building; on the first day of the strike this figure fell to 759, on the second day to 469 and on the third day to 355 (R. 324). Since manufacturing was stopped by the strike, the shipments did not rise sharply after termination of the strike on February 4; it took more than a week for outgoing shipments to reach a normal level (R. 324). Inbound shipments did not experience a similar slow recovery; after dropping from 210 on the day before the strike to 20, 25, and 12 on the three strike days, such shipments rebounded to 140 on Saturday, February 4, and to 496 on Monday, February 6 (R. 323). Plainly, incoming shipments had accumulated in the hands of the carrier due to the impossibility of delivery during the strike.

Upon the basis of the foregoing facts, the District Court concluded that neither petitioners nor their employees are engaged in commerce or in the production of goods for commerce, and, further, that petitioners are service establishments entitled to the exemption provided by Section 13 (a) (2) of the Fair Labor Standards Act (R. 329–330). Judgment was accordingly entered dismissing the complaint (R. 338). The court below reversed (R. 349).

ARGUMENT

The facts and issues herein do not differ in any material respect from those in *A. B. Kirschbaum Company* v. *Walling*, No. 910, present Term, to be argued immediately preceding the instant case.[1] Our brief in No. 910 treats the issues fully and we accordingly refer the Court to that brief for the arguments in support of our position here.

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[1] In addition to advancing some of the arguments urged by petitioner in the *Kirschbaum* case, petitioners here suggest that the representation of their employees for collective bargaining purposes and any possible unfair labor practices are dealt with by the New York State Labor Relations Board rather than by the National Labor Relations Board (Brief, 32). This circumstance is immaterial to the question of federal power. *United States* v. *Darby Lumber Co.*, 312 U. S. 100, 114; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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